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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STEWART NATIONAL ORDER CENTER, INC., Plaintiff and Appellant, v. BANK OF AMERICA, NT&SA, Defendant and Respondent.	G029522 (Super. Ct. No. 00CC10149) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Maseda & Anderson, Stephen B. Maseda and Michael D. Anderson for Plaintiff and Appellant.

Frandzel Robins Bloom & Csato and Thomas M. Robins for Defendant and Appellant.

* * *

Stewart National Order Center, Inc. (Stewart) mistakenly sent a $27,997.82 check to Bank of America (Bank) to pay off a third party's home equity loan. After efforts to retrieve the mistaken payment failed, Stewart sued the third party (a certain Mrs. Jang), and Bank. Bank asserted it was a holder in due course, among other defenses, and moved for summary judgment. The trial court granted summary judgment on several alternative grounds, including existence of a "complete defense." Because Stewart failed to raise a material issue of fact regarding Bank's status as a holder in due course, we affirm.

I

Stewart, apparently in its capacity as an escrow company, received $40,000 from BancOne in connection with a proposed refinance loan to Jang. The lender did not authorize Stewart to disburse the funds. Stewart nonetheless mistakenly sent $27,997.82 by check to Bank in payment of Jang's "Equity Maximizer Loan" with Bank, which was secured by a second mortgage. The check was made out to Bank as the payee. On September 27, 1999, Bank applied the Stewart check to pay off Jang's loan. The check cleared Stewart's bank the next day. At some point in this period, Jang decided not to go through with the refinance loan from BancOne.

On October 5, 1999, Stewart notified Bank of the error and two days later Bank received Stewart's written confirmation that the check was sent by mistake. Thereafter, efforts were made to address the problem. Bank insists it conditionally agreed to help unwind the payoff transaction, provided Jang authorized reinstatement of her loan with the proper documentation and there were no new interceding liens on her property. Stewart suggests Bank orally agreed to refund the check merely upon Stewart's written request. Jang, it turns out, was not interested in cooperating with Stewart on reinstating the loan; in January 2000 she requested reconveyance of Bank's trust deed on her property.

Bank reconveyed the deed in March 2000. Jang declared bankruptcy and was discharged on July 31, 2000.

Stewart then sued both Jang and Bank, alleging two causes of action. In the first cause, Stewart sought to cancel the Bank's reconveyance of Jang's trust deed, presumably with the understanding or hope that this would facilitate reinstatement of Jang's loan and the return of Stewart's check. Secondly, Stewart sought relief "[d]etermining the parties' respective rights and allegations [obligations?] in connection with the payment, the and [*sic*] reconveyance and the [*sic*] BofA Trust Deed and loan agreement; and [¶] . . . costs of suit and such other and further relief as this court deems just and proper." Though inartfully phrased, it is apparent Stewart wanted a declaration it had sent payment to Bank by mistake and was entitled to refund.

Bank moved for summary judgment, which the trial court granted. The court's minute order reads: "Plaintiff is not a party to the Jang/Bank of America loan agreement, the Jang trust deed, or the Bank of America reconveyance to Jang and hence does not have standing to seek that the reconveyance between them be vacated. Similarly, plaintiff has no standing to seek an equitable declaration of the rights between Jang and Bank of America in respect to such matters. Moving defendant has met its burden of showing both that the complaint has no merit in that said defendant has a complete defense to the two unlabeled equitable causes of action against it and that plaintiff cannot establish an element of said causes of action. The burden thus shifted to plaintiff to show that a triable issue of one or more material facts exists as to said causes of action and the court finds that plaintiff has failed to meet that burden. Summary judgment granted." On appeal, the parties have not supplied us with a transcript of the summary judgment hearing. We will affirm the trial court's ruling if it is correct on any of the alternative rationales

articulated by the court. (See *Cohen v. Equitable Life Assurance Society* (1987) 196 Cal.App.3d 669, 673.)

II

The party moving for summary judgment must persuade the court it is entitled to judgment as a matter of law and that no disputed issue of material fact exists to preclude such judgment. (See, e.g., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of going forward. (*Ibid.*) It must point the court to the law claimed to be dispositive and present prima facie evidence that the law applies. (See *id.* at p. 851 ["'prima facie evidence . . . establishes a rebuttable presumption'"], quoting Evid. Code, § 602.) Here, Bank relied on well-established law that a holder in due course takes a check free of any claim of mistake. (Cal. U. Com. Code, § 3305, subd. (b).) By an affidavit and other supporting evidence, Bank asserted it was a holder in due course because it took Stewart's check: (1) for value (in payoff of Bank's loan to Jang), (2) in good faith, and (3) without notice of any defense or claim in recoupment. (Cal. U. Com. Code, § 3302, subd. (a)(2).)

Once the moving party has met its initial burden, the burden of production shifts to the opposing party to present evidence showing a triable issue of one or more material facts. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) In other words, summary judgment was improper here only if a reasonable juror could conclude a material underlying fact made it more likely than not (i.e., there was a preponderance of evidence) that Bank was *not* a holder in due course.

Stewart failed to present *any* evidence to suggest Bank was not a holder in due course. Stewart did not question that Bank took the check (1) for value, (2) in good faith, and (3) without notice of any defense or claim in recoupment. Indeed, Stewart utterly ignored Bank's holder in due course defense below, and also fails to address it on appeal. In its separate statement of facts, Stewart expressly confirmed it was "Undisputed" that "Bank of America had no knowledge that the money had been paid by mistake."

As Bank pointed out in its summary judgment motion, "payment of . . . an antecedent claim against any person, whether or not the claim is due" satisfies the "for value" prong of the holder in due course test. (Cal. U. Com. Code, § 3303, subd. (3).) Nor was there any suggestion Bank took Stewart's check in bad faith. (See *Sasner v. Ornsten* (1949) 93 Cal.App.2d 467, 471 (*Sasner*) ["'circumstances or suspicions'" of a defect or defense must be "'so cogent and obvious that to remain passive would amount to bad faith'"].) Nor did Bank have notice, "at the time the check[] w[as] negotiated," of any defense or claim in recoupment. (*Ibid*.) Stewart finally notified Bank of the mistake a week after it cleared Stewart's bank, but as in *Sasner*, the relevant inquiry is "at the time [the holder] received the checks . . . in payment of a . . . debt." (*Ibid.*)

Both below and on appeal Stewart cites *National Bank of California v. Miner* (1914) (*Miner*) 167 Cal. 532 for the proposition that a depository bank (instead of its borrower) must return a mistaken payment credited to the borrower. There, a bank refused to honor a cashier's check it mistakenly issued. The payee had deposited the check in another bank and that bank applied the amount of the check to offset a promissory note owed to it by the payee. When the depository bank sent the cashier's check to the issuing bank for collection, the issuing bank refused to pay, asserting as a defense its own error in issuing the check. The depository bank sued. The trial court decided in favor of the

plaintiff bank, but the Supreme Court held the bank "had not, upon the reception of the appellant bank's check and its bookkeeping transfers thereafter, changed its condition to its detriment in any legal sense which would justify its enforced collection of the check of the appellant bank. The entries which it thus made were all subject to its control and could be changed without injury or detriment to it to comport and comply with the truth. . . . [By] its reception of appellant's check it parted with no value and changed its condition only by a stroke of its bookkeeper's pen which another stroke could rectify." (*National Bank of California v. Miner*, *supra*, 167 Cal. at pp. 538-539.)

Miner predates even the adoption in 1917 of the Negotiable Instruments Law, the predecessor to article 3 of the Uniform Commercial Code (UCC). It is therefore inapposite because it does not address the rights of holders in due course. The UCC, in fact, has eviscerated *Miner* in every respect. (See Cal. U. Com. Code, § 3418, subd. (c) [issuing drawee bank may not assert its mistake against person who takes instrument in good faith and for value]; see also *id.*, § 3303, subd. (3) [instrument applied to antecedent debt is taken "for value"].)

Counsel must not seek to mislead a court about the current state of the law (Rules Prof. Conduct, rule 5-200(A)), and having failed to brief the law or facts regarding Bank's holder in due course claim, this appeal is without merit. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627 [court "is entitled to the assistance of counsel"], § 596, p. 630 ["'appellant's brief is of no help to us'"].) At best, Stewart might have argued Bank did not "give value" until it reconveyed to Jang its deed of trust several months after learning of Stewart's mistake. But as mentioned above, the relevant moment for notice of a defense is "at the time [the holder] received the checks . . . in payment of a . . . debt." (*Sasner v. Ornsten*, *supra*, 93 Cal.App.2d at p. 471; accord *Sullivan v. United*

Dealers Corp. (Ky.Ct.App. 1972) 486 S.W.2d 699, 701 ["Notice, in order to prevent one from being a bona fide holder . . . , means notice at the time of the taking or at the time the instrument is negotiated, and not notice arising subsequently"]; *Waterbury Sav. Bank v. Jaroszewski* (Conn.Cir.Ct. 1967) 238 A.2d 446, 448 ["If plaintiff was a holder in due course at the time it took delivery of defendant's note, notice thereafter to it of [a defense] would not change its legal position"]; see also *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 ["it is not this court's function to serve as . . . backup appellate counsel"].)

At oral argument, counsel suggested that Bank, as a "payee," could not be a holder in due course. But California law has long been to the contrary. (*Flores v. Woodspecialties, Inc.* (1956) 138 Cal.App.2d 763, 769.) It is true that: "In the typical case the holder in due course is not the payee of the instrument. Rather the holder in due course is an immediate or remote transferee of the payee." (Uniform Commercial Code com. 4, 23A West's Ann. Cal. U. Com. Code (2002) § 3302, p. 271 (hereafter UCC comment).) "However, as the commentators make clear, under the Commercial Code's definition of 'holder in due course,' '[t]he payee of an instrument can be a holder in due course' even though 'use of the holder-in-due-course doctrine by the payee of an instrument is not the normal situation,' and only 'in a small percentage of cases' would it be 'appropriate to allow the payee of an instrument to assert rights as a holder in due course.' [Citing UCC comment, p. 271]." (*Gentner and Co. v. Wells Fargo Bank* (1999) 76 Cal.App.4th 1165, 1169 (*Gentner*).)

The percentage of "'appropriate'" cases is "'small'" because the payee usually deals directly with the drawer or maker, and hence only in rare cases can the payee "somehow meet the requirement of good faith and complete lack of knowledge about any

potential defenses held by the drawer or maker of the instrument." (*Gentner*, *supra*, 76 Cal.App.4th at p. 1169.) But as in *Gentner* this is just such a case where, as discussed above, the "original payee [was] able to establish such complete ignorance" of any defense. (*Ibid.*) Needless to say, Stewart neglected to bring *Gentner* to our attention, let alone suggest any reason to deviate from it. Although as in *Gentner* the result here may seem harsh, "it is in line with the Commercial Code's purpose of promulgating the integrity, certainty, and finality of commercial transactions." (*Id.* at p. 1179.) The Code, through holder in due course protection in particular, promotes the use and circulation of instruments by protecting those who give value in good faith reliance on them. And "[w]hen a payee presents a check to the drawee bank, it is entitled to a prompt and accurate answer to the question 'Is this check good?' so that it may plan its financial affairs accordingly." (*Id.* at p. 1180.) Having ignored the holder in due course doctrine and applicable case law, Stewart has failed to supply any principled way for us to decide this appeal in its favor.

The judgment is affirmed. Respondent is entitled to its costs. (Cal. Rules of Court, rule 26.)

ARONSON, J.

WE CONCUR:

SILLS, P.J.

BEDSWORTH, J.